APPENDIX A

IN THE

United States Court of Claims

FRITZ KYER, *Plaintiff,* vs. UNITED STATES OF AMERICA, *Defendant.*	Docket No. 326-64

PETITION

To the Honorable, The United States Court of Claims:

COUNT ONE

The petition of Fritz Kyer, for a First Count, respectfully represents that:

I

Plaintiff is a citizen of the United States and resides at 4564 East San Gabriel Avenue, Fresno, in the State of California.

II

This claim is filed against the United States under and pursuant to the provisions of 28 U.S.C. Section 1491.

III

The Grape Crush Administrative Committee is an agency created under the provisions of, and pursuant to, the Marketing Agreement and Order No. 990

issued under the Agricultural Marketing Agreement Act of 1937 as amended (7 U.S.C. 601-674).

IV

That at all times herein mentioned plaintiff was and now is a duly licensed broker carrying on a brokerage business in alcohol, wines, distilled spirits and similar alcoholic products.

V

That during 1962 plaintiff was employed by said Grape Crush Administrative Committee to procure a purchaser for the surplus or "set aside" wine and wine products under the control of said Grape Crush Administrative Committee, under an oral agreement by the terms of which said plaintiff was to be paid one cent per gallon on gallons sold, as commission.

VI

Thereafter in pursuance of the authority of said employment and in reliance thereon, and in consideration of the commission to be paid, plaintiff, acting as the agent for said Grape Crush Administrative Committee, procured and induced one Publicker Industries Inc. of Philadelphia, Pennsylvania, to make an offer of approximately thirty cents (30¢) per wine gallon at approximately 188 proof f.o.b. ship, Stockton, California, with an expressed willingness to go higher by one or two cents per gallon provided it was given the exclusive right to purchase all of

said "set aside" or surplus wine and wine products under the control of said Grape Crush Administrative Committee.

VII

Plaintiff thereupon communicated the offer of said Publicker Industries Inc. to said Grape Crush Administrative Committee and performed further services toward the consummation of said sale. In this connection, however, said Grape Crust Administrative Committee closed the sale of ten million, one hundred thousand gallons of said wine and wine products with said Publicker Industries Inc., but said Grape Crush Administrative Committee refused, and ever since has refused, and does now refuse, to pay to plaintiff any commission or compensation whatsoever, and plaintiff has made demand upon said Grape Crush Administrative Committee for his commission, but the defendant has refused and does now refuse to pay plaintiff any commission or compensation whatsoever, and no part of said commission of $101,000.00 has been paid, and plaintiff has been damaged in said sum of one hundred and one thousand dollars ($101,000.00) by reason of the matters and things herein set forth.

VIII

No action on this claim and demand has been taken by the defendant or by congress or by any department other than as set forth above. Plaintiff is the sole owner of the claim and has made no transfer or assignment of the claim or any part thereof. Plaintiff

is justly entitled to recover the amount claimed after allowing all just credits and set-offs.

COUNT TWO

The Petition of Fritz Kyer, for a Second Count, respectively represents that:

I

Plaintiff, Fritz Kyer, repeats and repleads all of the allegations contained in Paragraphs I, II, III and IV of his First Count, to which reference is hereby made, and the same are hereby incorporated and referred to in this Second Count and made a part hereof as though the same were again fully set forth.

II

Within three (3) years last past the plaintiff performed services for the defendant at its request, as broker, in the sale of ten million one hundred thousand gallons of alcohol, wine and wine products.

III

Such services were reasonably worth the sum of One Hundred and One Thousand Dollars ($101,000.00).

IV

Although demand has been made for payment upon defendant by and through said defendant Grape Crush Administrative Committee, the defendant has not paid said sum nor any part thereof.

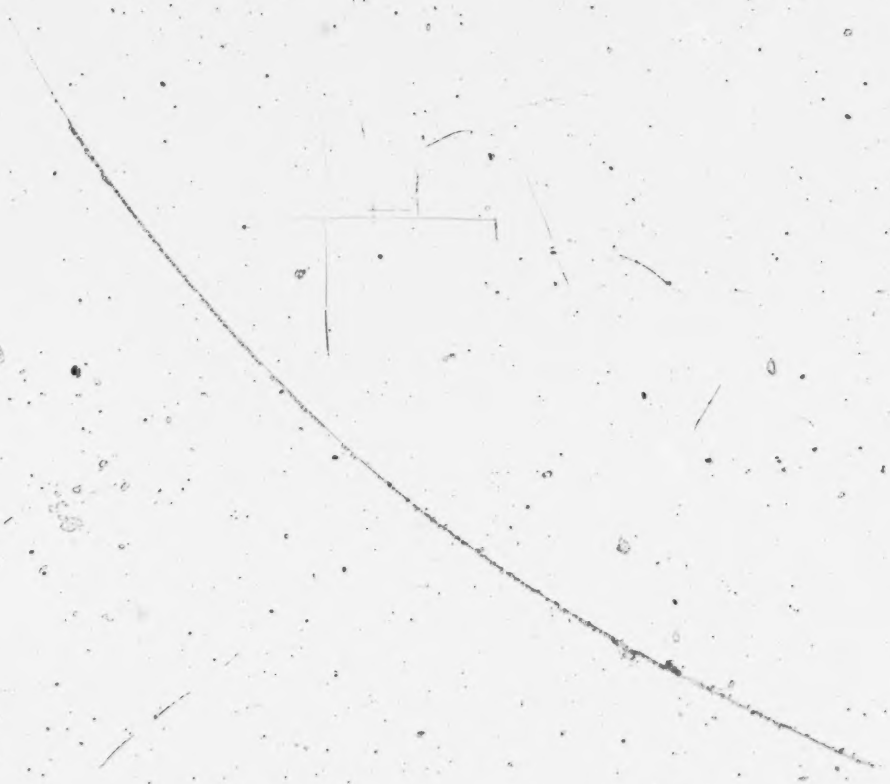
V

No action on this claim and demand has been taken by the defendant or by congress or by any department other than as set forth above. Plaintiff is the sole owner of the claim and has made no transfer or assignment of the claim or any part thereof. Plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets.

Wherefore, plaintiff prays judgment against the United States of America in the sum of One Hundred and One Thousand Dollars ($101,000.00), with interest thereon and for such other and further relief as may be proper.

L. KENNETH SAY,
Attorney for Petitioner.

LUCIUS POWERS, JR.,
LAWRENCE KENNEDY,
Of Counsel.



APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 326-64

(Filed Dec. 17, 1965)

FRITZ KYER v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT ON DEFENDANT'S MOTION TO DISMISS*

L. Kenneth Say, attorney of record for plaintiff.

Edward J. Friedlander, with whom was Assistant Attorney General John W. Douglas, for defendant.

OPINION

WILLI, Commissioner: This case presents the question of whether a broker can hold the United States liable for breach of a sales commission contract that he entered into with an unincorporated association of grape producers established and controlled by the Secretary of Agriculture pursuant to authority vested in him by the Agricultural Marketing Agreement Act of 1937, as amended. [1]

The defendant, characterizing the association as a so-called "nonappropriated-fund activity," has moved to dismiss on the theory that the United States has not consented to be sued on the contractual obligations of such an entity, the premise being that lack of consent is

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* The opinion and recommended conclusion of law are submitted pursuant to order of the court under Rule 54(b).

[1] C. 296, 50 Stat. 246; 7 U.S.C. §§ 601 *et seq.*

to be inferred from Congress' failure to appropriate funds in support of the activity.

The relevant facts, none of which are disputed, are simple and straightforward.

Plaintiff, a United States citizen and resident of Fresno, California, is a broker licensed to deal in alcohol, wines, and various other distilled spirits.

In 1962, he entered into a sales commission contract with the Grape Crush Administrative Committee, an unincorporated association created under a federal marketing order [2] issued by the Secretary of Agriculture with respect to grapes produced in various specified counties of California.

Under the plaintiff's contract he was to secure an interested purchaser for a quantity of industrial alcohol that had been made from surplus grapes produced in the California area covered by the marketing order. For this service he was to receive a commission of one cent per gallon of alcohol sold. He located a purchaser, Publicker Industries, and the sale was made but the Committee refused to pay the stipulated commission.

The litigation that followed, and has now culminated here, began in a California state court. On request, the defendant's attorney has furnished copies of certain documents of record in that earlier litigation from which its pertinent details may be gathered.

On June 30, 1964, plaintiff filed suit in the Superior Court of the State of California for the County of Fresno against the Grape Crush Administrative Committee and sixty-two of its members named as "John Does."

On July 8, 1964, the United States Attorney for the Southern District of California filed with the United States District Court for the Northern Division of that

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[2] 7 C.F.R. §§ 990.1 *et seq.* (26 F.R. 7797; 26 F.R. 12751).

District, a petition for removal of the action to federal court pursuant to the provisions of 28 U.S.C. §.1442(a)(1).[3] The substantive allegation of the petition was:

> That the above-captioned action is one which may be removed to this Court pursuant to Section 1442 of Title 28, United States Code, for the reasons that said defendant Grape Crush Administrative Committee is an agency of the United States of America designated by the Secretary of Agriculture to administer the Federal Marketing Order, 7 C.F.R. 990.29. See *United States v. Levine*, 129 F.2d 745 (1942).

On July 9, 1964, the District Court, apparently accepting the representations quoted above, issued an order for removal.

On September 1, 1964, in the District Court to which plaintiff's suit had been removed, the United States Attorney filed a motion to dismiss. The grounds of the motion were (1) that the court lacked jurisdiction over the defendant; (2) that the court lacked jurisdiction over the subject matter of the action; and (3) that the complaint failed to state a claim on which relief could be granted.

In a supporting memorandum the United States Attorney urged that the Committee, as an "* * * integral part of the Department of Agriculture and of the United States",[4] could not be sued *eo nomine* because Congress

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[3] In pertinent part, this statute provides:

> Sec. 1442. *Federal officers sued or prosecuted*
>
> (a) A civil action or ciminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *.

[4] In dealing with the jurisdictional question posed by its pending motion, the Government does not recede from this characterization of the Committee.

had not consented to suit against it.[5] For the same reason, it was asserted, the plaintiff had failed to state a claim on which relief could be granted.

It was further contended that suit did not lie against the individual Committee members, named as "John Does," for two reasons. First, it was said that Rule 17, F.R.C.P., did not authorize suit against "fictitious defendants"[6] and, second, that under a regulation[7] promulgated by the Secretary of Agriculture the Committee members were immunized from personal liability on account of any acts of omission or commission within the scope of their committee work.[8]

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[5] See, e.g., *Blackmar v. Guerre*, 342 U.S. 512 (1952).

[6] The memorandum did not expand on what was meant by "fictitious" defendants. It seems clear that, notwithstanding the absence of specific names, all concerned understood that the defendants in question were the individual members of the Committee. Rule 17(b), F.R.C.P., provides that the suability of individual members of an unincorporated association is to be determined by reference to the law of the state where the district court action is pending — in this case California. Section 388 of the California Code of Civil Procedure provides that individual members of an unincorporated association may be sued in the name of the association. Since in this instance the association was a named defendant, its individual members, albeit not specifically named, were joined as defendants by operation of law. See 42 California Law Rev. 812 (1954) for a general discussion of the question of joinder in the case of California unincorporated associations.

[7] 7 C.F.R. Sec. 990.76 *Personal Liability*.

No member or alternate member of the committee or board, nor any employee, representative, or agent of the committee shall be held personally responsible, either individually, or jointly with others, in any way whatsoever, to any person, for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate member, employer, representative, or agent, except for acts of dishonesty.

[8] Though admittedly the positions advanced in the prior litigation create no binding estoppel or legal obligations of consistency in the instant proceeding, it is interesting to note that essentially the whole defense advocated by Government represen-

On October 1, 1964, eleven days before[9] the District Court dismissed the suit with prejudice for failure to state a claim on which relief could be granted, plaintiff filed suit against the United States in this court for the same commission that he had initially attempted to recover from the Committee and its members.[10]

According to the defendant,[11] it is the doctrine of sovereign immunity in its generally understood sense[12] that defeats this court's jurisdiction in the within case. The focus is thus on the Government's amenity to suit

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tatives on behalf of the Committee and its members was bottomed on the premise that the United States, as the Committee's principal, was the real party in interest in the controversy. Only before this court, it seems, has the Committee become legally orphaned as a "nonappropriated-fund activity."

[9] The Government has made no jurisdictional claim based on this consideration. See, e.g., *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. ___, 343 F.2d 943 (April 1965).

[10] The moving papers disclose (Plaintiff's Objections To Defendant's Motion To Dismiss The Petition, pp. 3-4) that in December 1964, the Grape Crush Committee was terminated as provided by law. 7 U.S.C. § 608c(16). Pursuant to the authority vested in him with respect to the affairs of such agencies, the Secretary of Agriculture assumed custody of the Committee's books and records and responsibility for its orderly liquidation, including the final distribution of its funds. In this connection, the Secretary noted the pendency of the instant suit in this court and directed that a contingency fund of $135,000 be retained in order to meet any judgment that the plaintiff might obtain. The Secretary stipulated that the Department of Agriculture would distribute to eligible producers such portion of the contingency funds as remained after final disposition of the plaintiff's contract claim.

[11] Specifically, the defendant says: "It is the contention of defendant that this is an unconsented suit against the United States and should therefore be dismissed for lack of jurisdiction over the subject matter." (Defendant's Motion To Dismiss The Petition, p. 2.)

[12] See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586-587 (1941).

against it on this claim rather than on the liability implications of the merits of the claim.

Defendant says that the absence of Congressional consent to this suit follows as a matter of law from the fact that the Grape Crush Committee is a "nonappropriated-fund activity." Whatever other functional characteristics that term may connote, the dispositive attribute, according to the defendant, is the fiscal fact that the Committee's operations are not underwritten by appropriated funds. Thus, the claim is that when Congress fails to appropriate funds in furtherance of an activity, whether or not governmental in nature, it must be deemed to have withheld its consent for suits against the United States on contract claims arising therefrom.

The plaintiff, though insisting that the United States is liable for breach of the contract in question, acknowledges that " * * * the funds for administration of the Order came not from the Department of Agriculture, but were taxed directly to the handlers in the area." (Plaintiff's Objections To Defendant's Motion To Dismiss The Petition, p. 4.)

Accordingly, insofar as appropriations actually utilized in this particular activity are concerned, the undisputed facts of the case furnish a presumptively adequate foundation for the jurisdictional argument that defendant advances.

This court has repeatedly declared that the contracts of the conventional nonappropriated-fund instrumentalities of the armed forces, although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court. *G. L. Christian And Associates v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, 425 (1963), and on rehearing 160 Ct. Cl. 58, 320 F.2d 345, 351 (1963), *cert. denied*, 375 U.S. 954; *Borden v. United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Co. v.*

United States, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); *Gradall v. United States*, 161 Ct. Cl. 714, 329 F.2d 960 (1963); *Keetz v. United States*, 168 Ct. Cl. 205 (1964).

Proceeding on the assumption that the results in these cases were based on appropriation considerations, the defendant relies on this body of authority in urging dismissal for want of jurisdiction.

Accordingly, the question is whether the Grape Crush Committee is substantially indistinguishable from the "conventional nonappropriated-fund instrumentalities" comprehended by the decided cases.

Typically, where the issue at stake was the United States' contractual liability, military post exchanges and kindred organizations have been the "nonappropriated-fund instrumentalities" in those decisions of this court on which defendant relies and in the analogous decisions of other courts as well.[13]

Without exception these decisions have held that the Government is not liable on contracts entered into with third parties by the exchanges. Moreover, in every such decision rendered since 1942 the courts have treated the question as controlled by an expression contained in a Supreme Court opinion of that year in *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

A thorough examination of these authorities, including *Standard Oil Co. v. Johnson, supra*, reveals that the results announced therein were clearly not based on the matter of appropriations, as related either to the doctrine of sovereign immunity or otherwise. Recovery against the United States was denied for reasons of liability, not immunity. Essentially, the Government was held not liable on various post exchange contracts because, under applicable principles of agency, it was not

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[13] *Bleuer v. United States*, 117 F. Supp. 509 (E.D. S.Car. 1950); *Bailey v. United States*, 201 F. Supp. 604 (D.C. Alaska 1962).

a party to such contracts. Thus, the plaintiffs' difficulty was with the merits rather than the enforceability of their claims.

The certainty that appropriation considerations were not significantly involved in the end results of the decided cases is best demonstrated by the fact that, as the courts have recognized, [14] post exchange activities have traditionally and consistently drawn substantial support and sustenance from the federal revenues. Thus, whatever the validity of defendant's appropriation argument as an abstract proposition, it is inapplicable in the case of post exchanges because the factual premise (i.e., non-appropriation) on which it depends simply does not exist. *Cf. Gay Street Corp. v. United States*, 130 Ct. Cl. 341, 346-347 (1955).

Since 1903 the exchanges have been almost invariably included in military appropriation bills. [15]

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[14] See, e.g., *Standard Oil Co. v. Johnson*, *supra*, at 484; *Pulaski Cab Co. v. United States*, 141 Ct. Cl., *supra*, at 163.

[15] C. 975, 32 Stat. 927; c. 1485, 33 Stat. 259; c. 1307, 33 Stat. 827, 836; c. 3078, 34 Stat. 240, 253; c. 2511, 34 Stat. 1158, 1169; c. 163, 35 Stat. 106, 119; c. 252, 35 Stat. 732, 744; c. 115, 36 Stat. 243, 255; c. 209, 36 Stat. 1037, 1050; c. 391, 37 Stat. 569, 582; c. 93, 37 Stat. 704, 715; c. 72, 38 Stat. 351, 364; c. 143, 38 Stat. 1062, 1076; c. 418, 39 Stat. 619, 636-637; c. 12, 40 Stat. 40, 56-57; c. 29, 40 Stat. 182, 195-196; c. 79, 40 Stat. 345, 363; c. 28, 40 Stat. 821, 830; c. 143, 40 Stat. 845, 862; c. 201, 40 Stat. 1020, 1029; c. 8, 41 Stat. 104, 118-119; c. 240, 41 Stat. 948, 963; c. 33, 42 Stat. 68, 83; c. 253, 42 Stat. 716, 719; c. 178, 42 Stat. 1377, 1380; c. 291, 43 Stat. 477, 480; c. 225, 43 Stat. 892, 895; c. 146, 44 Stat. 254, 256; c. 167, 44 Stat. 1106, 1108; c. 232, 45 Stat. 326, 329; c. 366, 45 Stat. 1349, 1352; c. 862, 46 Stat. 1014-1015; c. 520, 47 Stat. 709, 718-720; c. 165, 48 Stat. 614, 642; c. 54, 49 Stat. 120, 148; c. 404, 49 Stat. 1278, 1309; c. 423, 50 Stat. 442, 468; c. 347, 52 Stat. 642, 667; c. 88, 53 Stat. 592, 618; c. 343, 54 Stat. 350, 378; c. 262, 55 Stat. 366, 392; c. 477, 56 Stat. 611, 631; c. 185, 57 Stat. 347, 367; c. 303, 58 Stat. 573, 593-594; c. 265, 59 Stat. 384, 404; c. 583, 60 Stat. 541, 563; c. 357, 61 Stat. 551, 569-570; c. 632, 62 Stat. 647, 667; c. 787, 63 Stat. 987, 1022; c. 512, 65 Stat. 423, 448, 449.

In 1933 and 1934, Congress required disbanded organization funds of $298,068, derived primarily from post exchange operations, to be covered into the Federal Treasury.[16]

Since 1902 post exchanges have been permitted, with the consent of the Postmaster General, to exercise the franking privilege on all correspondence relating to their business. January 23, 1902, Circular No. 5, Hdqrs. of the Army, Washington.

At posts where exchange buildings have not been provided for by direct appropriation Army regulations[17] have required the commanding officer to set aside any available building suitable for post exchange use. If such a building is unavailable the commanding officer may authorize the construction of a temporary building, utilizing the labor of troops, and the Quartermaster Corps is authorized to supply the necessary tools, windows, sashes, doors, and such other material as may be on hand and can be spared. The Quartermaster is also authorized to furnish heat and heat and lighting apparatus and to sell ordinary subsistence items to a post exchange at cost. Post exchanges are permitted the free use of radio, telegraph, and cable facilities owned by the Department of Defense.

Post exchanges have been relieved of the burden of a variety of federal taxes. S.T. 620, XII-1 Cum. Bull. 419 (1933); S.S.T. 269, 1938-1, Cum. Bull. 441. In certain instances such exemption has been based on the finding that the exchanges were "wholly owned" by the United States. S.S.T. 385, 1940-1 Cum. Bull. 202.

Finally, as this court noted in *Dugan v. United States*, 34 Ct. Cl. 458, 463 (1899), the exchanges receive the proceeds from sales of surplus rations that have, of course, been purchased with appropriated funds.

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[16] C. 281, 47 Stat. 1571, 1573; c. 756, 48 Stat. 1224, 1229.

[17] AR 210-65, pars. 46, 47, 51 and 59.

Considering the realities of the exchanges' long-standing and substantial involvement, both direct and indirect, with federal funds, it is altogether untenable to contend that by its appropriation activities Congress should be deemed, by implication, to have removed exchange contracts from the general waiver provisions of the Tucker Act. [18]

In 1887, by adopting the Tucker Act, Congress waived the sovereign's immunity as to suits against it founded on contract obligations. At no time since has Congress narrowed this general waiver by specifically removing the contracts of post exchanges or kindred activities from its scope. It failed to do this even though it repeatedly demonstrated both its awareness of the immunity implications [19] attending post exchange activities and the necessity for express conferral of immunity as to such activities by enactment of appropriate legislation.[20]

Accordingly, to the extent that any exchange contract may be regarded as that of the United States, the Government enjoys no immunity from suit thereon. If, on the other hand, such a contract is determined not to be that of the United States, then a suit against it fails for lack of a valid claim and not because Congress, for reasons independent of the merits of the particular claim, has refused to authorize the institution of suit thereon.

As stated earlier, the courts have generally regarded *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), as controlling authority for the proposition that the United States cannot be held liable on the contracts of nonappropriated-fund instrumentalities.

Notably, the case did not involve a post exchange's contract or the United States' liability thereon.

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[18] C. 359, 24 Stat. 505.

[19] C. 582, 49 Stat. 1519, 1521.

[20] C. 787, 54 Stat. 1059-1060.

A California statute imposed a license tax, measured by gallonage, on the privilege of distributing motor vehicle fuel within the State. A specific exemption was provided in the case of "* * * any motor vehicle fuel sold to the Government of the United States or any department thereof for official use of said Government."

The question in the case was whether Army post exchanges came within the quoted language of the exemption provision so that sales of gasoline to such organizations could be made free of tax.

In holding that exchanges were within the exemption, the Court found "* * * that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." *Standard Oil Co. v. Johnson, supra,* at 485.

Before examining the factors on which the Court relied in reaching its announced conclusion, the quoted reference to immunity should be particularly noted. Specifically, the immunity enjoyed by exchanges was declared to be coextensive with that of the War Department, no more and no less. Recognizing the unquestioned amenity of the United States to suit on War Department contracts by virtue of the Tucker Act, it is apparent that if the sovereign is deemed insulated from liability on a contract entered into by one of the "integral parts of the War Department" its nonliability must rest on reasons other than immunity.

At the outset, the Court charted the relevant guidelines for determining the legal status of post exchanges and their relationship to the United States. Thus, it said (at page 483):

> ** * * post exchanges operate under regulations of the Secretary of War pursuant to federal au-*

thority. These regulations and the practices under them establish the relationship between the post exchange and the United States Government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined. (Emphasis supplied.)

The dispositive role of the administrative regulations[21] could scarcely have been made clearer.

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[21] In *Dugan v. United States*, 34 Ct. Cl. 458 (1899), this court traced the origin and early development of military post exchanges.[a] As the opinion in that case shows, such entities were created and controlled, not by specific act of Congress but by Army regulations[b] issued by the Secretary of War under a general delegation of authority provided by statute. Although initially such regulations became effective only after express Congressional approval,[c] the requirement for such legislative affirmation was dropped in 1875[d] and never again imposed thereafter.

[a] See also *Kenny v. United States*, 62 Ct. Cl. 328, 355 fn 1 (1926) and *Woog v. United States*, 48 Ct. Cl. 80 (1913).

[b] The first such regulations were published as G.O. 46, Hdqrs. of the Army, July 25, 1895.

[c] Sec. 20, Act of July 15, 1870, c. 294, 16 Stat. 315, 319, provided:

> *And be it further enacted*, That the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the Army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session; *Provided*, That said regulations shall not be inconsistent with the laws of the United States.

[d] An Act of March 1, 1875, c. 115, 18 Stat. 337, provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That so much of section twenty of the act approved July fifteenth, eighteen hundred and seventy, entitled "An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and seventy-one, and for other purposes," as requires the system of general regulations for the Army therein authorized to

As the final item of a resume of various practices and procedures exemplifying the effect of the applicable Army exchange regulations, the Court observed (at page 485):

> *The Government assumes none of the financial obligations of the exchange.* But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops. (Emphasis added.)

Evaluated in context, the underscored remark represents nothing more than the specification of one aspect of the exchange regulations[22] which, if viewed in isolation, might vary the conclusion that exchanges are full-

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be reported to Congress at its next session, and approved by that body, be, and the same is hereby, repealed; and the President is hereby authorized under said section, to make and publish regulations for the government of the Army in accordance with existing laws.

[22] Until recently, the following had been the provision dealing with post exchanges typically contained in the published regulations [32 C.F.R. (1962 Ed.), Sec. 554.6 (24 F.R. 3323, Apr. 29, 1959)]:

Sec. 554.6 *Legal status.*

The A&AFES is an instrumentality of the United States entitled to the immunities and privileges available to the departments and agencies of the Federal Government under the Federal Constitution and statutes and under international treaties, conventions, and administrative agreements. The United States is not responsible for contract, tort, and compensation claims against the A&AFES and has not waived its immunity from suit on those claims. Any claim arising out of the activities of the A&AFES shall be payable solely from nonappropriated funds.

The foregoing provision has been displaced by the following [32 C.F.R. (1962 Ed. as supplemented), Sec. 554.6 (28 F.R. 5564, June 6, 1963)]:

fledged governmental arms. That this lone consideration had no such effect was promptly demonstrated by the Court's enumeration of a series of countervailing functional attributes that also emanated from the regulations.

The essential importance of all this for our purposes is not so much the effect of the nonliability feature on the exchanges' governmental status as it is the fact that the regulations are the source of that nonliability.

Accordingly, in observing, as *obiter dictum*, that the Government was not liable on exchange financial obligations, the Court was simply applying the settled principle that whatever the form in which the Government functions, anyone entering into an arrangement with it takes the risk of having accurately ascertained that he who purports to act for the Governments stays within the bounds of his authority, the scope of which may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

The Government's nonliability in such a situation stems not from the absence of a relinquishment of sov-

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Sec. 554.6 *Legal status.*

The A&AFES is an instrumentality of the United States. As such, it is entitled to the immunities and privileges enjoyed by the Federal Government under the Constitution, Federal statutes, established principles of International Law, and international treaties and agreements. The A&AFES is immune from direct State taxation and from State regulatory laws, such as licensing and price control statutes, whose application would result in interference with the performance by the A&AFES of its assigned federal functions. Suits by or against the A&AFES or individual exchanges are in legal effect suits by or against the United States and must be brought in the name of the United States. However, claims against the A&AFES or individual exchanges and judgments, including compromise settlement of court actions, against the United States arising out of exchange activities are payable solely out of A&AFES funds.

ereign immunity to suit but from the operation of common law rules of agency under which the doctrines of apparent authority and estoppel have, for reasons of public policy, long been held inapplicable where the Government's role is that of principal.

As early as 1813 the Supreme Court announced the rule and its underlying reasons.

In *Lee v. Munroe*, 7 Cranch (11 U.S.) 366 (1813), the holder of certain promissory notes agreed to accept several parcels of Washington real estate from his debtors in satisfaction of the debt. Ostensibly the debtors had acquired these properties from the City of Washington.

Before consummating this arrangement the creditor inquired of the Commissioners of Washington whether they would convey the properties in question to him. They agreed that they would and so noted in their official journal. The creditor thereupon turned over the notes to his debtors in return for an order from them directing the Commissioners to convey the subject properties to the creditor.

In fact, the debtors still had purchase money obligations outstanding on these properties and when the creditor presented the debtors' conveyance order to the Commissioners they refused to convey unless the creditor paid the remaining balance due on the properties. The debtors thereupon became insolvent. The creditor then sued the United States, in the name of the Commissioners, for damages resulting from his acceptance of the Commissioners' earlier assurance with respect to conveyance.

In his suit the creditor relied on the line of authority to the effect that if one who is about to lend money with real estate as collateral approaches a prior mortgagee, disclosing his intention of making the loan, and is advised by the latter that the property is unencumbered the law will thereafter give the lender preference over the prior mortgagee with respect to the property.

In denying recovery, the Court acknowledged the validity of the above principle in private transactions directly involving the real parties in interest but refused to extend it to situations where the public's interest was represented by agents. In such instances, the Court declared, estoppel will not lie against the Government "* * * unless it most manifestly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make the declaration or representation which is relied on as the ground of relief." *Lee v. Munroe, supra,* at 368.

The Court based its ruling on considerations of practical necessity, saying (at pages 369-370):

> Were it otherwise, an officer interested with the sales of public lands, or, empowered to make contracts for such sales, might by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very valuable and large tracts of rural estate, and even produce alienations of them without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, by which, by improper collusions, it would be very difficult for the public to protect itself.

This special rule of agency, singularly applicable in the case of a governmental principal, has been universally accepted and applied. *Hawkins v. United States,* 96 U.S. 689, 691-692 (1877); *Kelly v. United States,* 116 Ct. Cl. 811, 818-820 (1950); *Nuss v. United States,* 127 Ct. Cl. 197, 206-207, 117 F. Supp. 413 (1954); *Newman v. United States,* 133 Ct. Cl. 429, 438, 135 F. Supp. 953 (1955); *National Electronic Laboratories, Inc. v. United States,* 148 Ct. Cl. 308, 316, 180 F. Supp. 337 (1960); *Byrne Organization Inc. v. United States,* 152 Ct. Cl. 578, 586-587 (1961); *United States v. Holley,* 199 F.2d 575, 578 (5th Cir. 1952); *Blake Construction Co. v. United States,* 296 F.2d 393, 396 (D.C. Cir. 1961); *Prestex Inc.*

v. United States, 162 Ct.Cl. 620, 625, 320 F.2d 367 (1963); *G. L. Christian and Associates v. United States*, *supra*.

In its decisions in the post exchange area this court has not just followed the pronouncement of *Standard Oil Co. v. Johnson*, *supra*, respecting the Government's contract responsibility, but has premised that result on the agency principle previously discussed. In short, the holdings have been that the Government was not liable on the exchange contracts because, by virtue of the published exchange regulations, it was not a party to them.

In *Borden v. United States*, *supra*, the plaintiff unsuccessfully attempted to hold the United States on an employment contract between himself and an overseas post exchange. Although the precedential significance of *Standard Oil Co. v. Johnson*, *supra*, was given due deference, both the majority[23] and dissenting[24] opinions make clear the heavy influence of the applicable regulation on the court's decision.

More recently, in *Pulaski Cab Co. v. United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958), the court again considered the question of the United States' legal responsibility under a contract entered into by a military post exchange. Though the result was the same as in *Borden* *supra*, the supporting reasoning was somewhat more analytically expansive.

The opinion is particularly helpful in clarifying the respective significance and interrelationship of principles of liability, on the one hand, and immunity and jur-

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[23] *Borden v. United States*, 126 Ct. Cl., *supra*, at 908, where the majority noted that at the time of the transaction under review Paragraph 35(h)(1) of AR 210-65 provided:

> Exchange contracts are solely the obligation of the exchange. They are not Government contracts and the distinction between exchange contracts and Government contracts will be observed and clearly indicated at all times.

[24] *Borden v. United States*, 126 Ct. Cl., *supra*, at 912.

isdiction on the other, that operate to preclude a recovery against the Government on such a contract.

While it is true that the court phrased its ultimate conclusion in terms of want of jurisdiction,[25] it was made perfectly clear that the jurisdictional barrier to recovery only arose as a result of the liability determination to the effect that the Government was not a party to the contract on which suit was brought. Only then could it be said that the suit was without the scope of the Tucker Act.[26] Where such an antecedent determination is essential to the establishment of a jurisdictional void, the action fails on the merits, nor for want of jurisdiction.[27] *Ralston Steel Corp. v. United States*, 169 Ct. Cl. 119, 340 F.2d 663, 668-669 (1965), *cert. denied*, 381 U.S. 950.

To determine that the suit was not founded on "any express or implied contract with the United States," the court looked, as it had in *Borden, supra*, to the applicable exchange regulations which provided that: "Contracts involving exchanges are not Government contracts and such distinction will be stated therein." *Pulaski Cab Co. v. United States*, 141 Ct. Cl., *supra*, at 163. Coupling this feature of the regulations with the proposition that an agent without authority to do so cannot make

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[25] "We are of the opinion that plaintiffs must fail in their attempt to invoke the jurisdiction of this court." *Pulaski Cab Co. v. United States*, 141 Ct. Cl., *supra*, at 162.

[26] 28 U.S.C. § 1491 providing in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded * * * upon * * * any express or implied contract with the United States * * *.

[27] Since the Tucker Act serves as both the measure of this court general jurisdiction and as the embodiment of the sovereign's waiver of immunity in the contract area, the same reasoning would apply if the suggestion was that the suit failed because the United States had not consented to its being brought rather than because of the merits.

the United States liable for its contracts,[28] the court found that the Government was not a party to the contract in suit. There is no suggestion that, had the privity determination been otherwise, the action would have failed for reasons of jurisdiction or immunity. Indeed, the contrary implication is to be gathered from the court's remarks directed to the fact that the question of the exchange's liability was not before it. *Pulaski Cab Co. v. United States,* 141 Ct. Cl., *supra,* at 163.[29]

Admittedly, other courts have both held and observed as *obiter dictum* that Government instrumentalities, because they are instrumentalities, enjoy a federally derived immunity from suit on their own obligations. *Edelstein v. South Post Officers Club,* 118 F. Supp. 40 (E.D. Va. 1951); *Bailey v. United States,* 201 F. Supp. 604 (D.C. Alaska 1962). With due respect, I am unable to find any reasoning or analysis in support of those views. Certainly such an immunity is not to be inferred as a

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[28] *Pulaski Cab Co. v. United States*, 141 Ct. Cl., *supra*, at 165.

[29] Though the Grape Crush Committee's own liability is similarly not before the court in the instant case, it is recognized that implicit in the decision rendered herein is the principle that, absent specific immunizing legislation, if the Government agent is to escape contract accountability in its own right it can only do so by a determination that it contracted on behalf of its principal within the scope of its actual authority as appropriately disclosed. It cannot fashion a cloak of immunity from the mere fact that it functions generally in the capacity of a Government agency or instrumentality because, since the passage of the Tucker Act, there is no contract immunity at the source from which it must draw — its principal. Thus, it would appear that in the post exchange situation the very regulations that prevent a third party from looking to the Government operate to expose the exchange to liability by specifically placing its contractual activities without the scope of its agency. *Sloan Shipyards v. U.S. Fleet Corp.*, 258 U.S. 549, 567 (1922). Here, if the Committee's authority as agent be held not to extend to commitment of federal funds in respect to its contract with plaintiff, then the contract is its own and its rights and liabilities thereunder are to be determined according to the rules applicable in the case of any private party.

matter of general principle. *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 390-391 (1939); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 703-704 (1949).

Applying the principles announced in *Standard Oil Co. v. Johnson, supra,* and in this court's decisions in *Borden, supra,* and *Pulaski Cab Co., supra,* it is evident that the critical inquiry in deciding the fundamental problem[30] posed by the instant motion is whether, in entering into the contract on which suit is brought, the Grape Crush Committee was acting within the scope of its actual authority as an agent of the United States. To resolve this question of agency, we look to the relevant statute and regulations.

In *United States v. Rock Royal Co-operative*, 307 U.S. 533, 542-548 (1939), the Court discussed the structure and objectives of the Agricultural Marketing Agreement Act of 1937,[31] as amended (7 U.S.C. § 601 *et seq.*).

Declaring that the interstate exchange of agricultural commodities on an orderly and reasonably priced basis is in the national public interest,[32] Congress propounded a series of measures in aid of this objective and vested the Secretary of Agriculture with the authority and responsibility for the implementation of them.[33]

Among the devices selected to effectuate the declared policy of the Act was that of the so-called marketing order.[34] Its general purpose was to establish and main-

[30] This opinion treats the defendant's motion as one for judgment on the pleadings in order that the result, for which it contends, not be made to depend solely on the question of whether this court has jurisdiction to entertain the controversy.

[31] The Act, c. 296, 50 Stat. 246, was adopted as a partial reenactment and amendment of the Agricultural Adjustment Act of 1933, c. 25, 48 Stat. 31. The legislation followed as an aftermath of the decision in *United States v. Butler*, 297 U.S. 1 (1936)

[32] 7 U.S.C. § 601.

[33] 7 U.S.C. § 602.

[34] 7 U.S.C. § 608c.

tain such marketing conditions for various agricultural commodities, including grapes, as would provide, in the interests of producers and consumers, an orderly flow of such commodities to market during their normal marketing seasons in order to avoid unreasonable fluctuations in supplies and prices.[35]

Congress provided legislative standards for the issuance, composition, and administration of the marketing orders. Thus, it designated the "handlers" (i.e., processors or distributors)[36] as the focal point of the regulatory aspects of the enumerated agricultural commodities[37] as to which orders could be issued. It charged the Secretary with the responsibility for determining whether, applying stated criteria, a marketing order should be issued[38] and prescribed various functional features that were to be included in such orders as were issued.[39] Among such features was one incorporated in the marketing order here involved; that of: "Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof."[40] Another authorized the Secretary to appoint agencies, such as the Grape Crush Committee, to administer the marketing orders that he promulgated.[41]

The Act also required that marketing orders, such as the one here involved, include provision for assessment

[35] 7 U.S.C. § 602(4).

[36] 7 U.S.C. § 608c(1).

[37] 7 U.S.C. § 608c(2).

[38] 7 U.S.C. § 608c(3), (4).

[39] 7 U.S.C. § 608c(6), (7).

[40] 7 U.S.C. § 608c(6)(D).

[41] 7 U.S.C. § 608c(7)(C).

against each affected handler of his pro rata share of such expenses, *other than expenses of receiving, handling, holding or disposing of* the subject commodity, as the Secretary deems reasonable and likely to be incurred by his appointed local agency.[42]

Congress appropriated substantial funds for, among other things, "administrative expenses" of the various activities authorized by the Act,[43] including the issuance and administration of marketing orders, and for encouragement of domestic consumption of agricultural commodities "by diverting them, by the payment of benefits or indemnities, or by other means, from the normal channels of trade and commerce."[44]

Over the years appropriations in furtherance of the various programs authored by this legislation have been substantial. For all of these programs, the language of the Act became authority for the making of appropriations. *Calvert Distilling Co. v. United States*, 94 Ct. Cl. 517, 522 (1941).

Considering the totality of the provisions referred to above, it cannot be said that either in terms of function or supporting appropriation, Congress registered any discernible disclaimer of federal responsibility with respect to a surplus disposal transaction such as the Grape Crush Committee's commission contract with the plaintiff.

The detection of surpluses of specified agricultural commodities and their removal from normal channels of trade were among the primary responsibilities delegated to the Secretary under the terms of the Act. Congress declared such activities to be in the national interest and authorized the Secretary to utilize agents of

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[42] 7 U.S.C. § 610(b)(2)(ii).

[43] 7 U.S.C. § 612(b), (c).

[44] 7 U.S.C. § 612c.

his selection for carrying them out. In short, the powers, and indeed the duties, conferred on the Secretary by the Act were amply broad to accommodate his participation, on behalf of the United States, in a surplus disposal transaction of the type here in suit. That he elected to have his duly appointed agent act in his stead does not of itself serve to narrow the authority granted him by Congress.

Finally, if the Secretary's authority to make such a contract be acknowledged, it cannot be said that the appropriation measures approved by Congress failed to provide for the expenses incident thereto so as to necessarily undercut that authority by implication. *Cf. Gay Street Corp. v. United States*, 130 Ct. Cl. 341, 346-347 (1955). Whether and to what extent federal moneys were in fact used to sustain the operations of the Grape Crush Committee as the Secretary's agent is not the relevant inquiry in this connection. The critical question is whether Congress provided moneys on which the Secretary was free to draw in the exercise of his delegated powers. Examined without undue attenuation, the underlying legislation requires an affirmative answer so that had the Secretary entered into the contract with plaintiff he could lawfully have committee appropriated funds to its execution.

The ultimate problem therefore becomes that of ascertaining the breadth of the Secretary's delegation of his powers to the Grape Crush Committee. As already noted, Congress specifically authorized him to discharge his functions and responsibilities in the marketing order area through agents of his selection.[45] It does not, of course, follow that simply because the Secretary elected to use the agency device in this instance he necessarily endowed his appointee with all of his powers under the Act. Nothing therein requires him to operate in this connection on an all-or-nothing basis. *United States v.*

[45] See fn. 41, *supra*.

Allen-Bradley Co., 352 U.S. 306 (1957). The scope of the power grant is to be determined from the terms of the marketing order [46] of which plaintiff was aware by operation of law.[47] This is the teaching of *Standard Oil Co. v. Johnson, supra,* and *Federal Crop Ins. Corp. v. Merrill, supra.*

Consonant with the several statutory directives previously mentioned, the marketing order contains a fully comprehensive array of provisions covering the establishment, functions, powers, and duties of the Committee and its operating relationship to the Secretary.

The principal general power and responsibility [48] vested in the Committee is the administration of the terms and provisions of the marketing order promulgated by the Secretary.

For each crop year the Committee is responsible for recommending to the Secretary the quantity of grapes that may be freely sold without marketing restrictions.[49] If approved by the Secretary, this recommendation becomes controlling as to the area covered by the order.[50]

In those instances where actual production of grapes exceeds the quantity that the Secretary has determined may be freely sold, the marketing order requires that the excess be converted by the "handlers" into spiritous grape products of a type approved by the Secretary. The order denominates such products as "set aside."[51] In the instant case the set aside was the industrial alcohol that plaintiff alleges he was commissioned to sell for a specified finder's fee.

[46] 7 C.F.R. §§ 990.1 *et seq.* (26 F.R. 7797; 26 F.R. 12751).

[47] Sec. 7, Act of July 26, 1935, c. 417, 49 Stat. 502; 44 U.S.C. § 307.

[48] 7 C.F.R. § 990.34.

[49] 7 C.F.R. §§ 990.47, 990.53.

[50] 7 C.F.R. § 990.48.

[51] 7 C.F.R. § 990.54.

The Committee is authorized generally to sell, or otherwise dispose of, all or any part of a set aside on the best terms obtainable that are consistent with the terms and aims of the order and is specifically so empowered with respect to a set aside consisting of industrial alcohol.[52] The order directs, however, that when such a transaction occurs, the proceeds of sale, "after deduction of any expenses incurred by the committee in receiving, handling, holding, or disposing" of the set aside product, shall be distributed pro rata among the interested producers.[53] Third parties involved in set aside disposal transactions are therefore told that incidental expenses of the types enumerated are to be paid by the interested producers out of sales proceeds. Any subsisting doubt that this provision serves notice that the Secretary, and in turn the Treasury, are not responsible for the payment of such expenses is eliminated by the section of the order dealing specifically with the Committee's authority to incur expenses. It provides:[54]

> The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by it during each crop year for the maintenance and functioning of the committee and board and for such other purposes, *other than expenses incurred in receiving, handling, holding or disposing of set aside*, as the Secretary may, pursuant to the provisions of this subpart, determine to be appropriate. The committee shall file a proposed budget of expenses and rate of assessment with the Secretary as soon as practicable after the beginning of the crop year. (Emphasis supplied.)

Considerations of equity, however compelling, cannot obscure the fact that in dealing with the Committee the plaintiff was on notice[55] both that it had no authority to

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[52] 7 C.F.R. § 990.62(a), (c).

[53] 7 C.F.R. § 990.62(d).

[54] 7 C.F.R. § 990.71.

[55] Fn. 47, *supra*.

commit the Secretary to the payment of expenses of disposing of the set aside alcohol and that such expenses were to be paid, for the account of the interested producers, out of the proceeds of sale. Such proceeds in the hands of the Committee are, by virtue of the order, impressed with a trust for the benefit of creditors such as the plaintiff.

While the language employed admittedly differs greatly from that used in the post exchange regulations, the essential message is the same. With commendable directness the exchange regulations state that exchange contracts are not those of the Government, Here the third party is told: "You may deal with the agency for the purchase of set aside goods, but if you do you must look to the sales proceeds of those goods for payment of any claims that you have against the agency arising out of such dealing." In terms of Government responsibility as principal, the effect is the same. The fact that in the case of the marketing order the Secretary reserves a power of veto[56] over committee actions cannot be held to change the result. Nor can the reduction of plaintiff's damage claim to $100,000 convert a contract with the Committee to one with the Government. 31 U.S.C. § 724 (a) is solely concerned with the mode of paying judgments and interest thereon. Its concern is with the satisfaction, not the creation of federal liability. *United States v. Turner*, 47 F.2d 86, 88 (8th Cir. 1931).

In summary, it is the settled rule of governmental agency that prevents the plaintiff from holding the United States on his contract with the Committee. He was told by the Secretary's regulations that he could not treat the Government as the Committee's principal for purposes of this contract.

The plaintiff's failure here is not attributable to problems of sovereign immunity or lack of jurisdiction

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[56] 7 C.F.R. § 990.75.

as either of those concepts are conventionally understood and applied.

Nothing in the Agricultural Marketing Agreement Act in terms abridges the Tucker Act's waiver of immunity in the contract area. Moreover, the appropriation features of the former do not permit the inference that Congress withheld the support of the federal revenues from implementation of the national program and activities that it sponsored, and so signified an implied narrowing of the waiver.

Divorced from the agency principles on which this case turns, jurisdiction is not a relevant consideration. Only after the Secretary's regulations are considered and applied can it be said that this is not a suit on a contract with the United States. Thus, where the United States is the named defendant, liability is necessarily determined before a basis for jurisdictional challenge arises. A jurisdictional determination in those circumstances is an afterthought — at most an abstraction.

It is recognized that this opinion shuts off the last avenue in the plaintiff's series of unsuccessful efforts to secure a judicial assessment of the merits of his claim. Certainly those efforts may not be effectively frustrated by a chameleon-like transition in the legal character and status of the Committee.

For purposes of responsibility under the contract in suit, the Committee is either the Secretary's child or his stepchild, not either — depending upon what court happens to be examining the relationship.

From the documents of record supplied by defendant's attorney, it seems quite clear that the plaintiff's suit against the Committee and its membership was both removed from the State Court and dismissed in the District Court on the Government's fundamental representation that the Committee was acting as the Secretary's agent. Taking his cue from those representations

and the results that they produced, the plaintiff proceeded against the United States in this court and was promptly met with the claim that recovery could not be had, because the Committee was not the Secretary's agent for purposes of the contract in question. One can only speculate as to the extent to which the Government's reasoning and advocacy would have been stabilized had the damage award sought by plaintiff fit within the $10,000 limitation on the District Court's Tucker Act jurisdiction.[57]

In any event, it must be acknowledged that the very same agency considerations that relieve the Government of liability in this court squarely place the Committee and its members in a position of unsheltered responsibility respecting the contract in suit. That responsibility is neither diminished nor affected by the fact that the Committee was formed and functioned as the Secretary's agent for various defined purposes. Just as such a general aura of agency cannot be used to make the United States shoulder a contractual obligation that it has disclaimed in published administrative regulations, it cannot shield the Committee from responsibility on a contract that those same regulations have made its own.

The suggestion, urged by the Government before the District Court, that the Committee members were immunized from contract responsibility by virtue of the Secretary's regulation on personal liability[58] is wholly without merit. At least in the contract area, the Secretary is altogether without power to bestow the immunity that he purported to confer.

In adopting the Agricultural Agreement Act of 1937, Congress gave no intimation that the Secretary's own contracts were withdrawn from the suit provisions of

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[57] 28 U.S.C. § 1346(a)(2).

[58] Fn. 7, *supra*.

the Tucker Act. Moreover, in authorizing him to select agents of his choosing to execute his responsibilities in the marketing order area,[59] Congress neither clothed those appointees with immunity from contractual responsibility nor authorized the Secretary to do so.

While it was within the Secretary's competence to fashion his administrative regulations in a manner limiting the bounds of the Committee's agency capacity, and in so doing remove the United States as principal in respect to the Committee's contracts for set aside disposition, he had no power to grant immunity from suit, either to the United States or to the Committee in relation thereto.

In the light of the significant shift or "clarification," if preferred, of the Government's position as disclosed by its submissions in this court, it seems not improbable that in the exercise of its sound discretion the District Court might conclude, on appropriate application by the plaintiff, that there existed "reason justifying relief from the operation of the judgment"[60] granting the Committee's earlier motion to dismiss.

Nonetheless, however meritorious the plaintiff's contract claim against the Committee and its membership, his suit against the United States in this court must, for the reasons indicated, be dismissed for failure to establish a claim on which relief can be granted.

It is accordingly recommended that defendant's motion to dismiss be granted and that plaintiff's petition be dismissed.

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[59] 7 U.S.C. § 608c(7)(C).

[60] Rule 60(b)(6), F.R.C.P.

In the United States Court of Claims

No. 326-64

(Decided December 16, 1966)

FRITZ KYER v. THE UNITED STATES

Warren E. Magee for plaintiff; *L. Kenneth Say*, attorney of record. *Lucius Powers, Jr.*, and *Lawrence Kennedy*, of counsel.

Edward J. Friedlander, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS THE PETITION

COLLINS, *Judge*, delivered the opinion of the court:*

This is a suit for breach of contract in which recovery is sought for a brokerage commission allegedly due plaintiff for services rendered to an agency of the United States, established and controlled by the Secretary of Agriculture pursuant to authority vested in him by the Agricultural Marketing Agreement Act of 1937.[1]

*This opinion takes into consideration the Memorandum Report filed by Commissioner George Willi on December 17, 1965.

[1] Chapter 296, 50 Stat. 246, as amended, 7 U.S.C. §§ 601–24 (1964). The act was adopted as a partial reenactment and amendment of the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31, as amended. The legislation followed as an aftermath of the decision in *United States v. Butler*, 297 U.S. 1 (1936), which held certain sections of the 1933 act unconstitutional.

Plaintiff is a broker, licensed to deal in alcohol, wines, and various other distilled spirits. In 1962, he entered into a sales commission contract with the Grape Crush Administrative Committee (hereinafter the "Committee"). Under the terms of the contract, plaintiff was to secure a purchaser for a quantity of industrial alcohol that had been made from surplus grapes and, in consideration therefor, he was to receive a 1-cent-per-gallon commission. It is alleged that a purchaser was located and a sale consummated, but that demand for the commission was refused.

Plaintiff's action was initially commenced in a California State Court, whence, upon petition of the United States Attorney for the Southern District of California, the suit was removed to the appropriate United States district court. Removal was predicated upon 28 U.S.C. § 1442(a)(1) which provides, in pertinent part, for the removal of any civil or criminal action, involving, among others, a suit commenced against any agency of the United States.

Upon removal of the action to the district court, plaintiff was confronted with a motion to dismiss. In a supporting memorandum, the United States Attorney urged that the Committee, as an "* * * integral part of the Department of Agriculture and of the United States * * *," could not be sued *eo nomine* because Congress had not consented to suit against it. See, *e.g.*, *Blackmar* v. *Guerre*, 342 U.S. 512 (1952). It was further contended that suit did not lie against the individual Committee members, named as "John Does," for two reasons. First, it was said that Fed. R. Civ. P. 17 did not authorize suit against "fictitious defendants" and, second, that, under a regulation promulgated by the Secretary, the Committee members were immunized from personal liability on account of any acts of omission or commission within the scope of their Committee work.[2] Plain-

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[2] Under the act of 1933, ch. 25, § 10(c), (d), 48 Stat. 37, the Secretary of Agriculture was authorized to implement regulations to carry out the duties entrusted to him. This regulatory power was retained in the reenactment of 1937. The regulations applicable here appear in 7 C.F.R. §§ 990.1–.402 (1964). Section 990.76 of these regulations states:

"No member or alternate member of the committee or board, nor any employee, representative, or agent of the committee shall be held personally responsible, either individually, or jointly with others, in any way whatsoever, to any person, for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate member, employee, representative, or agent, except for acts of dishonesty."

tiff's suit was dismissed, with prejudice, for failure to state a claim upon which relief could be granted. *Kyer* v. *Grape Crush Administrative Comm.*, Civil No. 2508-ND, S.D. Cal., Order of October 12, 1964. In this present action, plaintiff is again faced with a motion to dismiss.

The Agricultural Marketing Agreement Act of 1937 sought, as its fundamental objective, to effect an orderly exchange of commodities in interstate commerce in order to protect both the interest of the consumer and the purchasing power of the farmer. This goal was to be effected through a series of measures with the authority for their implementation residing in the Secretary of Agriculture (hereinafter the "Secretary"). Among the devices selected was the so-called marketing order.[3] Its general purpose was to establish and maintain such marketing conditions for various agricultural commodities, including grapes, as would provide, in the interest of producers and consumers, a controlled flow of such commodities to market during their normal seasons in order to avoid unreasonable fluctuation in supplies and prices.[4]

Congress provided legislative standards for the issuance, composition, and administration of the marketing orders. Thus, it designated the "handlers" (processors or distributors)[5] as the focal point of the regulatory aspects of the enumerated agricultural commodities[6] as to which orders could be issued. It charged the Secretary with the responsibility for determining whether, applying stated criteria, a marketing order should be issued[7] and prescribed various functional features that were to be included in such orders as were issued.[8] Among such features was one incorporated in the marketing order here involved; that of:

> Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such

[3] 7 U.S.C. § 608c (1964).
[4] 7 U.S.C. § 602(4) (1964).
[5] 7 U.S.C. § 608c(1) (1964).
[6] 7 U.S.C. § 608c(2) (1964).
[7] 7 U.S.C. § 608c(3)-(4) (1964).
[8] 7 U.S.C. § 608c(6)-(7) (1964).

surplus elimination or control among the producers and handlers thereof.[9]

Implementation of the marketing orders was to be achieved through appointment, by the Secretary, of localized agencies such as the Grape Crush Administrative Committee.[10] The Secretary's power under the act included the authority to issue regulations governing the activities of such agencies. Among the duties thus delegated to the Grape Crush Administrative Committee were the following: For each crop year, the Committee was responsible for recommending to the Secretary the quantity of grapes that might be freely sold without marketing restrictions.[11] If approved by the Secretary, this recommendation became controlling as to the area covered by the order.[12] In those instances where actual production of grapes exceeded the quantity that the Secretary had determined might be freely sold, the order required that the excess be converted by the handlers into spirituous grape products of a type approved by the Secretary. The order denominated such products as "setaside."[13] In the present case, the setaside was the industrial alcohol that plaintiff alleges he was authorized to sell for a specified commission.

In pressing his claim here, plaintiff urges its enforceability against the United States on the sole ground that the Committee was an agency thereof and was duly authorized to enter into the contract in issue. Thus, from plaintiff's standpoint, the agency relation establishes the dispositive factor. In response, defendant affirms the Committee's status as an agency of the United States, but rests the disavowal of liability on two grounds: First, that the Committee's authority was limited in scope and specifically did not encompass the right to incur the expenses here sought; and, secondly, that defendant was immune from suit, the Committee being a nonappropriated fund instrumentality.

We hold that, despite compelling equities in his favor, plaintiff's claim cannot be vindicated in this court. Our

[9] 7 U.S.C. § 608c(6)(D) (1964).
[10] 7 U.S.C. § 608c(7)(C) (1964).
[11] 7 C.F.R. §§ 990.47, 990.53 (1964).
[12] 7 C.F.R. § 990.48 (1964).
[13] 7 C.F.R. § 990.54 (1964).

reasons, independent of any arguments advanced by either party, are the following:

The jurisdiction of this court under the Tucker Act[14] encompasses "any claim against the United States: * * * founded upon any express or implied contract with the United States; * * *." While the terms of this statute are broad, its words must be read in conjunction with and must be regarded as limited by another statute which provides that our judgments are paid only from appropriated funds.[15] Thus, to remain within the framework of our jurisdiction, it is essential that the contract sued on be one which could have been satisfied out of appropriated funds. It is not enough to say, as plaintiff does, that his contract was one to which the United States was a party. To be actionable *in this court*, that contract must be one which, in the contemplation of Congress, could obligate public monies. *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 14, 312 F. 2d 418, 425, *cert. denied*, 375 U.S. 954 (1963). If Congress has indicated that public funds shall not be involved, we cannot grant the relief requested. And that such is the case here seems to us quite clear.

The Committee with whom plaintiff contracted was neither supported by appropriations nor authorized, in any manner, to obligate such funds. Its financial support derived from two sources—handlers and producers. The former sustained the Committee's general expenses and the latter bore the costs involved in surplus disposals. This self-funding scheme is one that was created by Congress; the applicable statute, 7 U.S.C. § 610(b)(2)(ii), provides:

> Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that *each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or*

[14] 28 U.S.C § 1491 (1964).

[15] 28 U.S.C. § 2517 (1964) states, in part:

"(a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court."

agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. *The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers.* The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative. (Emphasis supplied.)

Within the limits of the foregoing statute, we can perceive no basis for inferring that public funds might be used to pay the commission which plaintiff was allegedly promised. Rather, the statute directly reflects the congressional aim of "equalizing the burden of * * * surplus elimination * * * among the producers and handlers * * *."[16]

Nor are we persuaded otherwise by the fact that Congress did provide certain appropriations, which might be construed as sufficiently broad in purpose to cover the expenses here sought. We refer here to the appropriations provided under 7 U.S.C. § 612c. Among the designated end uses for the sums allocated under this statute was the following: "(2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce * * *." Even if one were to say that the Secretary had authority under this statute to support the Committee through appropriated monies (rather than through the self-funding scheme which Congress primarily contemplated), plaintiff's standing here

[16] 7 U.S.C. § 608c(6)(D) (1964).

would not be altered. As the statute itself makes clear, the Secretary's authority under such circumstances would be totally discretionary—his decision not to implement his assigned duties through the use of appropriated monies would transgress no congressional mandate.[17] Under such circumstances, the absence of appropriated funds, through the result of executive discretion, remains consonant with the views of Congress and is therefore binding upon us in the same manner. In short, whether we regard it as the product of authorized executive discretion or a direct congressional expression, public funds were not made available to the Committee nor was the Committee in any sense authorized to obligate such funds. Therefore, the contract can not now be satisfied from an appropriated source.

The fact that the Secretary currently holds a purse out of which plaintiff's claim may possibly be satisfied cannot aid him here.[18] Since we cannot order the Secretary to pay out this money (in this case derived from private sources), we cannot undertake consideration of the claim. Both the lack of appropriation and our lack of jurisdiction with respect to the Secretary compel us to hold that relief cannot be found in this court.

We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We

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[17] 7 U.S.C. § 612c states that the appropriations made available to the Secretary "shall be expended * * * in such manner, and in such amounts as the Secretary of Agriculture finds will effectuate substantial accomplishment of any one or more of the purposes of this section." There has been no showing in this case that the Secretary ever relied upon this section to support any of the Committee's functions. Rather, both plaintiff and defendant concur that the sole sources of Committee funds were those which derived from handler and producer assessments.

[18] In December 1964, the Grape Crush Administrative Committee was terminated as provided by law. 7 U.S.C. § 608c(16) (1964). Pursuant to the authority vested in him with respect to the affairs of such agencies, the Secretary of Agriculture assumed custody of the Committee's books and records and responsibility for its orderly liquidation, including the final distribution of its funds. In this connection, the Secretary noted the pendency of the instant suit in this court and directed that a contingency fund of $135,000 be retained in order to meet any judgment that the plaintiff might obtain. The Secretary stipulated that the Department of Agriculture would distribute to eligible producers such portion of the contingency funds as remained after final disposition of the plaintiff's contract claim.

add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs congressional correction.

For the reasons stated, defendant's motion to dismiss is granted, and plaintiff's petition is dismissed.

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment

The Fifth Amendment of the Constitution of the United States provides, in pertinent part, as follows:

> No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes and Regulations

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. Sec. 601 *et seq.*, provides in pertinent part as follows:

> Sec. 608c(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.
>
> Sec. 608c(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.
>
> Sec. 610(b)(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by

him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

Marketing Order 990, C.F.R. Part 990, provides in pertinent part:

Sec. 990.29 A Grape Crush Administrative Committee (herein referred to as committee) is hereby established to administer the terms and provisions of this part. Such committee shall consist of 31 members of whom 18 shall represent producers, 12 shall represent handlers, and the 31st member shall be the chairman of the board and also the chairman of the committee. The producer representation shall be two members from each of the nine districts. The handler representation shall be one member for each of the handlers of the six largest tonnages crushed, four members for handlers of all other tonnages of the twenty-two largest tonnages, and one member from each of the remaining board categories of handler representation. For each member there shall be an alternate member.

Sec. 990.39 The Secretary shall select producer and handler members and alternate members of the board and the committee in the numbers and with the qualifications specified in this

subpart. Such selections may be made from the nominations certified by the committee and the board or from other eligible producers and handlers.

Sec. 990.62(d) *Net proceeds.* The proceeds from the disposition of any setaside shall be distributed, after deduction of any expenses incurred by the committee in receiving, handling, holding, or disposing thereof, to the respective producers or their successors in interest, on the basis of the tonnage of their respective contributions to the setaside weighted by sugar content and, when determined to be appropriate for any varieties, by the season average field price of each variety. The distribution of proceeds to producer members of cooperative associations shall be made to the appropriate association.

Sec. 990.72(a) *Requirement for payment.* Each handler shall pay to the committee, upon demand, with respect to free tonnage grapes for crushing received by him, including such grapes of his own production, his pro rata share of all expenses which the Secretary finds are reasonable and likely to be incurred by the committee during each crop year. Each handler's pro rata share shall be the rate of assessment per ton fixed by the Secretary. At any time during or after the crop year the Secretary may increase the rate of assessment to cover unanticipated expenses or a deficit in assessable tonnage. In order to provide funds to carry out the functions of the committee and the board, the committee may accept advance payments from any handler and such shall be credited towards assessments levied pursuant to this section against such handler. The payment of expense for the maintenance and functioning of the committee and the board may be required throughout the period during which this part is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

Sec. 990.72(b) *Refunds.* Any money collected as assessments during any crop year and not expended in connection with the committee's operations may be used by the committee for a period of four months subsequent to the end of such crop

year. At the end of such period the committee shall, from funds on hand, refund or credit to handlers' accounts the aforesaid excess. Each handler's share of such excess fund shall be the amount of the assessment he has paid in excess of his pro rata share of the actual expenses of the committee for the preceding crop year. Any money collected as assessments hereunder and remaining unexpended in the possession of the committee, or a successor board of trustees for liquidation, after termination of this part, shall be distributed in such manner as the Secretary may direct: *Provided,* That, to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.

The following provisions of Marketing Order 990, C.F.R. Part 990 are pertinent:

Sec. 990.35 Duties.
The committee shall have among others the following duties:

(a) To act as intermediary between the Secretary and any producer or handler;

(b) To keep minutes, books, and other records which shall clearly reflect all of its acts and transactions and these shall be subject to examination by the Secretary at any time;

(c) To investigate and assemble data on the production, handling, and marketing of grapes for crushing and the products of such grapes;

(d) To submit to the Secretary such available information with respect to grapes and grapes for crushing and the products thereof as he may request and such other information as the committee may deem desirable and pertinent;

(e) To select from among its members officers other than the chairman and to adopt such rules and regulations for the conduct of its business as it may deem advisable;

(f) To appoint or employ such other persons as it may deem necessary and to determine the salaries and define the duties of each such person;

(g) To cause the books of the committee to be audited by a certified public accountant at least once each crop year and at such other times as the committee may deem necessary or as the Sec-

retary may request, to submit two copies of each such audit report to the Secretary, and to make available a copy which does not contain confidential data for inspection at the offices of the committee by producers and handlers;

(h) To prepare and submit to the Secretary monthly statements of the financial operations of the committee and to make such statements together with the minutes of the meetings of said committee and the board available for inspection at the offices of the committee by producers and handlers;

(i) To give the Secretary the same notice of meetings of the committee and the board as is given to members;

(j) To investigate compliance with and to use means available to the committee to prevent violation of the provisions of this part; and

(k) To establish with the approval of the Secretary such rules and regulations as are necessary or incidental to administration of this subpart, as are consistent with its provisions, and as would tend to accomplish the purposes of this subpart and the act.

Sec. 990.62 Disposition.

(a) General. The committee shall have the power and authority to sell or dispose of any and all setaside upon the best terms and at the highest return obtainable consistent with the provisions and objectives of this part, including the encouragement of new uses or new geographical outlets. If on any January 31 the total setaside from all crop years is in excess of the equivalent of the shipments of desert wine for the preceding six months ending December 31, the committee shall, in the absence of foreseeable sales of such excess in normal outlets pursuant to paragraph (b) of this section, dispose of the excess by June 30 in non-normal outlets.

* * *

(d) Net Proceeds. The proceeds from the disposition of any setaside shall be distributed, after deduction of any expenses incurred by the committee in receiving, handling, holding, or disposing thereof, to the respective producers or their successors in interest, on the basis of the tonnage of their respective contributions to the setaside

weighted by sugar content and, when determined to be appropriate for any varieties, by the season average field price of each variety. The distribution of proceeds to producer members of the cooperative associations shall be made to the appropriate association.

Sec. 990.75 Rights of the Secretary.
The members of the committee and board (including successors or alternates) and any agent or employee appointed or employed by the committee, shall be subject to removal or suspension by the Secretary, in his discretion, at any time. Each and every decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time and upon such disapproval shall be deemed null and void.

The portion of Grape Crush Administrative Bulletin 64-5 dated December 4, 1964 applicable here reads as follows:

" Grape Crush Administrative Committee
703 North Fulton Street
P. O. Box 4035
Fresno, California 93744

Bulletin 64-5
December 4, 1964.

TO: GCAB Members and Alternate Members
Handlers

SUBJECT: Closing of GCAB Offices and Status of Liquidation of GCAC Affairs

1. Closing of GCAC Offices

The GCAC offices will be closed permanently on Friday, December 4. All employees will be terminated on that date except W. Allmendinger.

* * *

All of the GCAC books and records will be transferred to the custody of the United States Depart-

ment of Agriculture not later than December 4, 1964. Thereafter, the Department of Agriculture personnel will undertake to perform most of the remaining administrative activities for the Joint Board of Trustees that would otherwise be performed by the management staff. * * *

The remaining work involved in the first disbursement of pool proceeds such as processing of cancelled checks, reissuance of lost checks, etc. following the closing of the GCAC offices will be undertaken by the U.S. Department of Agriculture.

The lawsuit filed by Fritz Kyer on October 1 in the U.S. Court of Claims, Washington, D.C. against the United States Government is still pending. Since this suit involves the Surplus Pools, the Department of Agriculture requested that GCAC continue to hold the $135,000.00 reserve established to cover any possible liability resulting from Mr. Kyer's suit against the Committee, which was dismissed on October 5, 1964. If any portion of such reserve becomes available for disbursement to equity holders it will be disbursed to them by the U.S. Department of Agriculture. USDA has been given all necessary records to make such a disbursement. * * * "